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THE UNIFORM ACT ON DECLARATORY JUDGMENTS

THE National Conference of Commissioners on Uniform State Laws at its session in St. Louis in August, 1920, approved the first draft of a Uniform Act on Declaratory Judgments. At the next session of the Conference in 1921 the Act will probably receive final approval and be recommended to legislatures for enactment. The importance of the recommendations of this august body in promoting the enactment of legislation in our states warrants some comment upon the draft they have approved.

Although a few instances of statutory authorization for the rendering of declaratory judgments may be found in our state legislation prior to 1918, such as the California Act of 1850,¹ the Rhode Island Act of 1876,² the New Jersey Act of 1915,³ the Connecticut

¹ CALIFORNIA PRACTICE ACT, § 527: "An action may be brought by one person against another, for the purpose of determining an adverse claim which the latter makes against the former, for money or property, upon an alleged obligation." See *King v. Hall*, 5 Cal. 83 (1855). Cf. the action of jactitation, still used in many countries adopting the civil law, 28 YALE L. J. 1, 20.

² RHODE ISLAND, ACTS & RESOLVES, 1876, ch. 563, § 17, GEN. LAWS 1909, ch. 289, § 19: "No suit in equity shall be defeated on the ground that a mere declaratory decree is sought; and the court may make binding declarations of right in equity, without granting consequential relief." In *Hanley v. Wetmore*, 15 R. I. 386, 6 Atl. 777 (1886), this was construed narrowly, like the English Act of 1852 (28 YALE L. J. 26), and was deemed to require the existence of a possibility of obtaining coercive relief, which merely is not claimed. Sections 20-22 of the GENERAL LAWS of 1909 deal with declarations on the construction of written instruments; they have been used principally for the construction of wills.

³ NEW JERSEY, LAWS 1915, ch. 116, § 7, p. 185: "Subject to rules, any person

Act of 1915,⁴ and other isolated cases,⁵ it was not until 1918 that the movement acquired renewed momentum in the United States and now seems destined to sweep the country.⁶ Within the last

claiming a right cognizable in a court of equity, under a deed, will, or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such a right, and for a declaration of the rights of the persons interested." This statute is based, not on the broad power granted to the English courts under Supreme Court Rules of 1883, Order XXV, rule 5, but on the more restricted provisions of the rule of 1893, Order LIV, A.

This also is the basis of the Florida Act of 1919, LAWS 1919, ch. 7,857 (No. 75), p. 148, which adds the words "or corporation" after "any person." See *In re Ungaro's Will*, 88 N. J. Eq. 25, 102 Atl. 244 (1917); *Renwick v. Hay*, 90 N. J. Eq. 148, 106 Atl. 547 (1919); *Mayor of Bayonne v. East Jersey Water Co.*, 108 Atl. (N. J. Eq.) 121 (1919), 29 YALE L. J. 545-549. The English Order XXV, rule 5, of 1883, reads: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is, or could be claimed, or not." Order LIV, A, of 1893, reads: "In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

⁴ CONNECTICUT, PUB. ACTS, 1915, ch. 174, § 1, 2 GEN. STAT. 1918, § 5113: "An action may be brought by any person claiming . . . any interest in . . . real or personal property . . . against any person who may claim . . . any interest . . . adverse to the plaintiff . . . for the purpose of determining such adverse . . . interest . . . and to clear up all doubts and disputes, and to quiet and settle the title to the same." See *Ackerman v. Union & New Haven Trust Co.*, 90 Conn. 63, 96 Atl. 149 (1915), 91 Conn. 500, 506, 100 Atl. 22 (1917), where the court, Case, J., was most reluctant to admit the fact that this statute was in effect analogous to the English Order XXV, rule 5.

⁵ See references to various statutes and decisions which may be deemed to have authorized or involved declaratory judgments in 28 YALE L. J. 1, 3, 30-32; and in manuscript brief of Professor Edson R. Sunderland as *amicus curiae* in the case of *Anway v. Grand Rapids Ry.*, 179 N. W. (Mich.) 350 (1920).

⁶ Sunderland, "A Modern Evolution in Remedial Rights — the Declaratory Judgment," 16 MICH. L. REV. 69 (1917); Borchard, "The Declaratory Judgment — a Needed Procedural Reform," 28 YALE L. J. 1, 105 (1918); Sunderland, "The Courts as Authorized Legal Advisers of the People," 54 AMER. L. REV. 161 (1920); "The Declaratory Judgment," 20 COL. L. REV. 106 (1920); Harrison, "The Declaratory Judgment in California," 8 CAL. L. REV. 133 (1920); Kerr, "Declaration of Rights without Consequential Relief," 53 AMER. L. REV. 161 (1919); Vinje, "Declaratory Relief," 4 MARQUETTE L. REV. 106 (1920); Borchard, "Recent Declaratory Judgments," 29 YALE L. J. 545 (1920); Schoonmaker, "Declaratory Judgment," 5 MINN. L. REV. 32 (1920); Dodd, "Progress of Preventive Justice," 6 AM. BAR ASSN. J. 151 (Nov., 1920); Gates, "Declaratory Relief," PROCEEDINGS OF TENNESSEE BAR ASSN. 41 (1920); Medina, "Some Phases of the New York Civil Practice Act and Rules," 21 COLUMBIA L. REV. 113 (1921).

two years Michigan,⁷ Wisconsin,⁸ Florida,⁹ New York,¹⁰ and Kansas¹¹ have empowered their courts, with varying limitations, to

⁷ MICHIGAN PUBLIC ACTS 1919, No. 150, p. 278:

"Section 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will, or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

"Sec. 2. Declarations of rights and determinations of questions of construction, as herein provided for, may be obtained by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or equity side of the court, as the nature of the case may require, and where a declaration of rights is the only relief asked, the case may be noticed for early hearing, as in the case of a motion.

"Sec. 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order.

"Sec. 4. When a declaration of rights, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case.

"Sec. 5. Unless the parties shall agree by stipulation as to the allowance thereof, costs in proceedings authorized by this act shall be allowed in accordance with such special rules as the supreme court may make, and in the absence of such rules, the practice followed in ordinary cases at law or in equity shall be followed wherever applicable, and when not applicable, the costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party.

"Sec. 6. This act is declared to be remedial, and is to be liberally construed and liberally administered with a view to making the courts more serviceable to the people."

The Act of Kansas, approved February 17, 1921, is modeled upon the Michigan Act. See 19 MICH. L. REV. 537, 7 AMER. BAR ASSN. J. 107 (Mar., 1921).

⁸ WISCONSIN, LAWS 1919, ch. 242, § 2687 m., p. 253: "Equitable actions to obtain declaratory relief may be brought and maintained in the circuit court, and in matters of which the supreme court has original jurisdiction in the supreme court, and it shall be no objection to the maintenance of such an action that no consequential relief is sought or can be granted if it appears that substantial doubt or controversy exists

⁹ FLORIDA, LAWS 1919, ch. 7857, No. 75, p. 148. This Act resembles closely the New Jersey Act of 1915, quoted *supra*, note 3.

¹⁰ Civil Practice Act 1919, § 473, NEW YORK LAWS, 1920, ch. 925, p. 172: "The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

The bill pending in Connecticut is practically identical with the New York Act; so also is the federal bill conferring this power on federal courts of equity.

¹¹ Act of February 17, 1921, printed in 19 MICH. L. REV. 538, and 7 AMER. BAR ASSN. J. 107 (Mar. 1921).

render declaratory judgments, and the legislative sessions of 1921 will doubtless add several other states to the list. No organized

as to the rights or duties of parties, and that either public or private interests will be materially promoted by a declaration of the right or duty in advance of any actual or threatened invasion of right or default in duty. The judgment rendered in such an action shall bind all the parties thereto and be conclusive and final as to the rights and duties involved." See the discussion of this statute by Justice Vinje of the Wisconsin Supreme Court in 4 MARQUETTE L. REV. 106 (1920). The Wisconsin Act curiously seems to confine its authority to the making of declarations "in advance of any actual or threatened invasion of right or default in duty." There is no reason thus to restrict the scope of the power, for declarations ought to be made as well after a wrong has been committed. Possibly the limitation was unintentional; it can be cured by amendment.

The amendment proposed by the Massachusetts Judicature Commission to chapter 214 of the GENERAL LAWS, follows in substance the Wisconsin Act. It reads as follows:

AN ACT TO ESTABLISH PROCEDURE FOR DECLARATORY JUDGMENTS

Be it enacted, etc., as follows:

Section three of chapter two hundred and fourteen of the General Laws is hereby amended by adding at the end thereof the following:— (11) Equitable actions to obtain declaratory relief, in which it shall be no objection to the maintenance of such action that no consequential relief is sought or can be granted, if it appears that substantial doubt exists as to the alleged rights or duties of parties, [or] that an actual controversy has arisen as to such rights or duties which cannot be settled in any pending suit, and that either public or private interests will be materially promoted by a declaration of right or duty in advance of any actual or threatened invasion of right or default in duty. The judgment rendered in such an action shall bind all parties thereto and be conclusive as to the rights and duties involved. [italics mine]

Possibly the word "or," inserted by the writer in brackets, was unintentionally omitted. If not, the Act is seriously defective in making an "actual controversy" a condition precedent. This would deprive the declaratory judgment of some of its most useful functions in resolving doubts and uncertainties in legal relations before a controversy has arisen or where a controversy merely may arise. SECOND AND FINAL REPORT OF THE MASSACHUSETTS JUDICATURE COMMISSION, Jan., 1921, House No. 1205, pp. 113, 154.

For the same reason, the Amendment to the federal bill (§ 4808) proposed by the Committee on Jurisprudence and Law Reform of the American Bar Association, to meet the objection of the Michigan Supreme Court in the *Anway* case, namely, "when there is an actual controversy between the parties," is greatly to be regretted. Not only does it give undue weight to an absurd decision, but it restricts unnecessarily a common function of the declaratory judgment. All that English and other courts have required is a serious doubt or a potential controversy. See 7 AMER. BAR ASSN. J., p. 62 (Feb., 1921). The same criticism may be directed to the recent Act of Kansas, approved February 17, 1921; the clause in section 6 to the effect that it is the purpose of the Act "to afford relief from uncertainty and insecurity attendant upon controversies over legal rights" was probably not well thought out. The procedure for the removal of clouds from title, which bears close resemblance to one phase of declaratory judgment procedure, does not necessarily require an "actual controversy" (Kansas Act, section 1). The defect is hardly cured by the attempted definition of "actual controversy" in the Kansas Act, namely, "actual antagonistic assertion and denial of right." 7 AMER. BAR ASSN. J. 107 (Mar., 1921).

propaganda is responsible for the general acceptance and widespread adoption of this procedural reform; its intrinsic merits in effecting the removal of clouds from legal relations, in simplifying the adjudication of contested issues, and in preventing rather than merely curing legal injury and the accrual of damages, have served to gain for it the almost spontaneous approval of Bar associations and legislative committees. The movement has been immeasurably aided by the fact that the reforms promised are not confined to the realm of theory or speculation but have had the case-hardened test of nearly fifty years of British and continental judicial experience. While the practice of rendering judgments on contested issues of law or fact, without further coercive relief in the form of money damages, injunction, etc., goes back to the Roman law,¹² its appeal to the American Bar has been based largely upon the fact that other countries having relatively the same industrial, economic, and social development as our own have found the declaratory judgment increasingly useful as an instrument of preventive and remedial justice. Wherever the procedure has been adopted, it has constantly grown in favor and utility. If history is any guide, therefore, it justifies the belief that the procedure for declaratory relief will soon be adopted by most of our states, and will be used to the same extent that it now is in England and many of its colonies and in several countries of continental Europe. The Commissioners on Uniform State Laws, doubtless anticipating the rapid spread of the movement, have sought to regularize it by the recommendation of a uniform statute. Whether the Uniform Act can be adopted in the various states without amendment or qualification remains to be seen.

Before commenting upon the draft of the Uniform Act, it may be well to note the apparent obstacle to the extension of the reform interposed by a recent decision of the Michigan Supreme Court holding unconstitutional the Michigan Act authorizing the courts of that state to render declaratory judgments.¹³ The ground of the decision was that the rendering of declaratory judgments was not the exercise of "judicial power" in a constitutional sense, because the judgment was not followed by an executory decree for damages, injunction, etc., and because the courts cannot be con-

¹² 28 YALE L. J. 1, 10 *et seq.* (1918).

¹³ *Anway v. Grand Rapids Ry.*, 179 N. W. (Mich.) 350 (1920).

stitutionally empowered to decide moot cases or render advisory opinions or judgments not final. Several of the leading law journals, which have assumed the important function of examining critically the decisions of the courts from the standpoint of their adherence to law and principle, have been unanimous in condemning the Michigan decision as devoid of foundation in law or reason.¹⁴ Indeed, while the case presented to the court was probably inappropriate for a declaratory judgment, as there was no issue or difference of opinion between the parties,¹⁵ no justification was thereby afforded for the court's adventure into the domain of the irrelevant, especially as their essay, in seeking support for an undisguised prejudice, involved an inexcusable confusion of ideas between the declaratory judgment and the advisory opinion, the moot case and the judgment not final. Every reviewer of the decision, as well as the minority opinion in the case, has pointed out the court's fundamental misconceptions in ignoring the most obvious distinctions, and hence in mistaking the essence of judicial power and of the declaratory judgment. It seems hardly likely, therefore, that the decision will be followed in any other jurisdiction or that it will ultimately survive in Michigan itself.

The most notable feature of the draft of the Uniform Act is its length. It contains fourteen sections, whereas the longest of the statutes already passed, that of Michigan, contains but six; and in several states, Wisconsin, New Jersey, and New York, one section has been deemed sufficient to confer on the courts the power to render declaratory judgments. Florida's statute covers three sections, of which the first grants the power, the second provides for the making of court rules, and the third prescribes the date of its coming into force.

The effective part of the Uniform Act granting to the courts the power to make declarations is section one, which reads:

"SECTION I. *Scope.* The Courts of this State having jurisdiction in equity, shall have power in any suit in equity or in any independent or interlocutory proceeding, to declare rights and other legal relations on written request for such declaration, whether or not further relief is or could be claimed; and such declaration shall have the force of a final judgment or decree."

¹⁴ 19 MICH. L. REV. 86, 30 YALE L. J. 161, 21 COLUMBIA L. REV. 168, 5 MINN. L. REV. 172, 6 AM. BAR ASSN. J. 145 (Nov. 1920), 7 *ibid.* 141 (Mar., 1921).

¹⁵ The facts of the case are presented in the comments cited in note 14.

This language is almost identical with section 473 of the New York Practice Act, which comes into effect April 1, 1921,¹⁶ and with the bill now pending in the Connecticut legislature and in the federal Congress. The differences are as follows: the Uniform Act confers the power on courts "having jurisdiction in equity." The Wisconsin Act also provides for "equitable actions." In New York and Connecticut, where one court has jurisdiction in law and in equity, it was unnecessary to make a distinction in forum or form of action. But as the Uniform Act looks to states having separate courts of law and equity, and inasmuch as both legal and equitable relief can be granted by a declaration, the restriction of the forum to courts "having jurisdiction in equity" would seem to have been induced by considerations looking to facilities in trial procedure, the discretionary nature of the relief making it more appropriate to equity jurisdiction. A special verdict on disputed issues of fact may be taken by the court on submission to a jury.¹⁷ That both legal and equitable relief may be granted is indicated by the fact that the request for a declaration may be made "in any suit in equity or in any independent or interlocutory proceeding." The absence of the word "independent" from the New York Act and from the Connecticut bill has given rise to the question whether a hostile court might not interpret the provision that the court shall have power to declare rights "in any action or proceeding" to mean that such power exists only as incidental to actions or proceedings already begun and not in an independent proceeding especially brought to obtain a declaratory judgment. Such an interpretation would be distinctly contrary to the intention of the draftsmen, which contemplated the broadest methods of requesting declarations, both as incidental to actions or proceedings seeking a coercive judgment and in independent proceedings in which nothing but a declaration is sought. This appears more clearly from the clause "whether or not further relief is or could be claimed," and from the section of the New York Practice Act which provides that "This Act shall be liberally construed,"¹⁸ as well as from the

¹⁶ *Supra*, note 10.

¹⁷ Section 10 of the Uniform Act. Of the six rules adopted by the New York Supreme Court to carry into effect section 473 of the Civil Practice Act, one (Rule 213) provides for the taking of the special verdict of a jury to settle questions of fact.

¹⁸ The Uniform Act (§ 12) contains a similar provision.

terms of Rule 210 which provides that "in matters of procedure . . . the forms and practice prescribed in the civil practice act and rules for *other* actions" in the supreme court, shall be followed, and of Rule 212 which enables the court to decline a declaration in its discretion if it believes "the parties should be left to relief by *existing* forms of actions." (*italics mine*)

The first clause of section one of the Uniform Act providing for equitable jurisdiction may have to be modified in states having no separate courts of equity. In any event, to preclude doubt on the question whether suits at law may be brought for a declaration, the section might be amended to read: "in any suit *at law* or in equity or in any independent or interlocutory proceeding."

The clause "to declare rights and other legal relations," also incorporated in the New York Act and in the Connecticut and federal bills, was induced by the fact that "rights" is a term used with various meanings. The effort of an English court to restrict it to its correct meaning, namely, a legally sustainable claim to the performance of a duty by another, nearly served to bar the suit for a declaration by the Guaranty Trust Company that they were not under a duty to repay Hannay and Company certain sums of money which Hannay had advanced on certain forged bills of lading. They really sought, therefore, not a declaration of *right* but of freedom from duty, *i. e. privilege*. Only by the most technical construction of two clauses of Order XXV, Rule 5, did the English Court of Appeal, by a majority of one, decide to make the declaration requested.¹⁹ Inasmuch as it seems clear that "right" is but one of several jural relations which the court is empowered to declare, it seems preferable by exactness of language to forestall the difficulties which might arise, as they did in England, out of the use of the loose and broad term "rights," although no court should construe this so narrowly and literally as to exclude duty, privilege, no-right, power, liability, immunity, disability.²⁰ The assumption that the term "and other legal relations" was intended to cover the declaration of such relations of status, involving complex jural

¹⁹ Guaranty Trust Co. v. Hannay (C. A.), [1915] 2 K. B. 536, 565, 574. The case is more fully discussed in 28 YALE L. J. 1, 9 (1918).

²⁰ The Hohfeld tables of jural relations, to the clear analysis of which the declaratory action is peculiarly adaptable, are described in the valuable articles of the late Professor Hohfeld in 23 YALE L. J. 16 (1913), and 26 *ibid.*, 710 (1917); also in two notable articles by Professor Arthur L. Corbin: "Legal Analysis and Terminology," 29

(legal) relations, as owner, wife, partner, agent, etc., is not well founded, although there is no reason to exclude these from the jurisdiction conferred by the term "legal relations."

The last clause, "such declaration shall have the force of a final judgment or decree," clearly indicates its dissimilarity from the advisory opinion or the judgment not final.

The subsequent sections of the Uniform Act are concerned with a detailed prescription of rules of construction, procedure, and practice. There are twelve different sections, and while the second, which provides for the declaration of rights "or duties" under the construction of written instruments, may be deemed a proper extension, by specific description, of the more general power conferred in section one, most of the other sections cover rules which ordinarily would be incorporated in rules of court. The elaboration of these rules in the Uniform Act is explained by the Chairman of the Committee, Judge Caton, a distinguished leader of the Virginia Bar, by the fact that many states, especially in the South, do not confer on their courts any rule-making authority. In such states, therefore, the rules would have to be embodied in the statute. In New York, six simple rules were adopted by the Supreme Court to give effect to the Act, and in most states giving their courts the power to make rules the general power embraced in section one of the Uniform Act, together with rules such as have been adopted in New York,²¹ would probably suffice. It will be recalled that the

ibid., 163 (1919), and "Jural Relations and their Classification," 30 *ibid.*, 226 (1921). For the sake of completeness, they may be presented here:

Jural:	right	privilege	power	immunity
Opposites:	no-right	duty	disability	liability
Jural:	right	privilege	power	immunity
Correlatives:	duty	no-right	liability	disability

²¹ The New York rules to carry into effect § 473 of the Civil Practice Act are as follows (Wilson, Civil Practice Manual of the State of New York, "Rules"):

"TITLE 25 — DECLARATORY JUDGMENTS

"RULE 210. PRACTICE ASSIMILATED. An action in the supreme court to obtain a declaratory judgment, pursuant to section four hundred and seventy-three of the civil practice act, in matters of procedure shall follow the forms and practice prescribed in the civil practice act and rules for other actions in that court.

"RULE 211. PRAYER FOR RELIEF. The prayer for relief in the complaint shall specify the precise rights and [or?] other legal relations of which a declaration is requested and whether further or consequential relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated.

"RULE 212. JURISDICTION DISCRETIONARY. If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may

present declaratory judgment procedure was adopted in England in 1883 and 1893 by Rules of Court alone.

Section 2 of the Uniform Act reads:

"SECTION 2. *Construction.* Any person interested under a deed, will, contract, or other written instrument, or whose rights are affected by a statute, municipal ordinance or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance or franchise, and a declaration of rights or duties thereunder."

It will be observed that this section is derived from Order LIV, A, of the English Rules of 1893 and resembles the New Jersey and Florida Acts. With the addition of the words "municipal ordinance or franchise" it follows closely the proposed model Rules of Civil Procedure published by the American Judicature Society.²² The Michigan Act, very practically, incorporates in its first section the provisions of sections one and two of the Uniform Act.

The purpose of section two, of course, is to enable parties to obtain a judicial construction of any written instrument. While some of our states provide for the construction of wills, very few go beyond. No power of the courts in England has been more valuable to business men, especially during the war, than the power to determine the rights or other legal relations of parties under contracts. Section one authorizes the declaration of rights and other legal relations under verbal contracts.

Section two enables the constitutionality of a statute or municipal ordinance to be drawn in question by a declaratory action. Section five provides for notice to the Attorney General or corporation counsel; and in any event, the relief being discretionary, and open to denial in the absence of the necessary parties interested or of sufficient argument, there is no more danger than now of snap

decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised.

"RULE 213. VERDICTS OF JURY ON FACTS. In order to settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. Such verdict may be taken by the court before which the action is pending for trial or hearing. The provisions of sections four hundred and twenty-nine and four hundred and thirty of the civil practice act apply to a verdict so rendered.

"RULE 214. COSTS. Costs in such an action shall be discretionary and may be granted to or against any party to the action.

"RULE 215. APPEALS. Appeals may be taken in such actions as in other causes."

²² BULLETIN XIV. Rules of Civil Procedure, supplementary to the State-wide Judicature Act (BULLETIN VII-A) of the American Judicature Society, 1919. Article 14, Declaratory Relief, § 2, p. 55.

judgments being rendered on questions of constitutionality. Possibly the word "franchise," when the franchise is not embodied in a statute or ordinance, should more properly be inserted after the word "contract" in line 2, as merely one type of written instrument.

The last clause, "declaration of rights *or duties* thereunder," might be improved by the omission of the words "or duties." Either this phrase should be replaced by the clause in section one, "other legal relations," which seems preferable, or else it should be omitted altogether. In the latter event, the term "rights" would probably receive the broad construction embracing all jural relations; whereas if the term "duties" were included, it might narrow "rights" to its proper technical use, and thus exclude from the declaration powers, privileges, immunities, etc. Uniformity in the Act would be better served by maintaining throughout the form "rights" and/or "other legal relations." The Wisconsin Act, the California bill, the Massachusetts draft of the Judicature Commission, and the draft of the American Judicature Society are open to the same criticism.

Section 3 of the Uniform Act reads:

"A contract may be construed before there has been a breach thereof." This follows section 3 of the proposed Rules of the American Judicature Society, which in turn was influenced by the Ontario Rule 605. The insertion of this rule of jurisdiction brings up the question of policy of seeking by statute to limit or define the broad jurisdiction conferred in sections one and two. The practice of construing contracts before breach is one of the most useful functions of the English declaratory judgment procedure,²³ and any court acting under the powers conferred by sections one and two could hardly, in view of the origin and history of those sections, decline to construe a contract before breach. If the general powers of sections one and two are limited by the outline in later sections of specific fields of jurisdiction, there is danger that the functions of the court will be restricted to the specific types of cases provided for and that the growth of this remedial procedure will be hampered rather than aided. It was this consideration which persuaded the Supreme Court of New York not to limit the broad powers conferred in the Act by confining the jurisdiction to specific subjects, but to permit the procedure to grow empirically.

²³ See the cases discussed in 28 YALE L. J., 131 *et seq.* (1918).

With forty years of English experience to guide the court, and jurisdiction being discretionary, it seemed preferable to permit the process of judicial inclusion and exclusion to dictate the scope of the remedy. Section 12 of the Uniform Act seeks by express provision to avoid the danger of a limited construction of the general powers conferred in section one by reason of an enumeration of specific powers in other sections.

The provision of the New York Rule 212, by which the court, when declining in its discretion to make a declaration requested, must state "the grounds on which its discretion is so exercised," enables an appellate court to determine whether the discretion was properly exercised according to rule; and here the English precedents are certain to prove a valuable guide.

Section 4 of the Uniform Act reads as follows:

"*Executor, etc.* Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or duties in respect thereto.

"(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

"(b) To direct the executors, administrators, or trustees, to do or abstain from doing any particular act in their fiduciary capacity; or

"(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings or instruments."

With the exception of the final words, "of wills and other writings or instruments," this section is taken verbatim from the proposed Rules of the American Judicature Society. It has its source in the English Order 55, rule 3, which it amends and abridges. The power embraced in this section is now generally exercised by courts of equity and in several states is expressly conferred. It enables those occupying fiduciary relationships to obtain judicial guidance and protection in the performance of their duties and the exercise of their privileges and powers. Whether it was necessary to add the phrase "of wills and other writings or instruments" at the end of the section, seems questionable in view of the provisions of section 2. The section also includes the clause "*rights or duties*," which has been criticized in the discussion of section 2.

Section 5 of the Uniform Act reads as follows:

"Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a statute, the Attorney-General of the state shall, before judgment is entered, be notified by the party attacking the statute, and shall be entitled to be heard upon such question. In any proceeding which involves the validity of a municipal ordinance, the law officer of the municipality shall be notified by the party attacking the ordinance or franchise, and shall be entitled to be heard upon such question. And if the ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the state shall also be notified and be entitled to be heard."

This section is derived from sections 6, 7, and 8 of the draft of the American Judicature Society. The fact that the joinder of all parties "who have or claim any interest which would be affected" is made mandatory, may greatly hamper the extension of the relief. It would seem advisable to leave such joinder to the discretion of the court, as is usual in equity cases. The New York Supreme Court has adopted a much better rule, it would seem, by the broad provision that "in matters of procedure . . . the forms and practice prescribed in the civil practice act and rules for other actions" shall be followed. Relief being always discretionary, the English courts have felt free to decline the declaration where necessary parties affected were not joined or heard.²⁴ That persons not parties to the proceeding shall not be prejudiced thereby hardly requires express mention. Inasmuch as declaratory relief has received a wide extension in England without any such rule as is embodied in the first sentence of section 5, a rule which might be construed by a hostile court to limit the relief, it might have been well to leave such requirement to the ordinary principles of due process of law and to the discretion of courts exercising equitable jurisdiction.

Cases involving the constitutionality of statutes or ordinances are not chosen even now with any view to the presentation of a fair case testing the statute, but may embody operative facts of a most unusual kind. Yet upon the haphazard nature of the first

²⁴ *Bright v. Tyndall*, 4 Ch. D. 189 (1876); *Curtis v. Sheffield* (C. A.), 21 Ch. D. 1, 3 (1882).

case presented the constitutionality of legislation will often be determined. There is, therefore, no reason why the declaratory procedure — an issue with contesting parties appearing — should not be used as freely to determine the validity or constitutionality of legislative enactments. The Uniform Act prescribes the necessity for notice to the law officers of the municipality or state, and opportunity to be heard before such statute or ordinance is held invalid or unconstitutional. Such necessity would, in states not adopting the Uniform Act, and depending on court rules or the general principles of due process of law, probably be enforced in the exercise of the court's discretion. There is no harm in making the requirement express and specific.

Section 6 of the Uniform Act reads:

"Discretionary. The Court may refuse to exercise the power to declare rights or other legal relations in any proceeding where a decision under it would not terminate the uncertainty or controversy which gave rise to the proceeding, or in any proceeding where the declaration or construction is not necessary, and proper, at the time under all the circumstances."

This section is derived from section 4 of the draft of the American Judicature Society, which in turn was guided by Order LIV, A, rule 4 of the English Supreme Court. That Order, however, applies only to the construction of written instruments, whereas section 6 covers all declarations of "rights or other legal relations in any proceeding." For that reason it seems unnecessary to add the words "or construction" near the end of the section. In New York, Rule 212 expresses the discretionary power of the court more broadly by providing that "if, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised." The requirement for stating grounds preserves the power of appellate courts to review the exercise of the court's discretion and to reverse its action if not properly exercised under the circumstances; for, as is apparent from the English practice, the discretion is not arbitrary, but is limited pretty strictly by rule derived from precedents.

While the making of declarations has always been subject to the court's conceptions, enlightened by a liberal social and judicial

consciousness, of the utility of the declaration in a particular case, it was not until the case of *Austen v. Collins*²⁵ that an expression of the court's attitude was announced; the *dictum* then uttered was much narrower in its statement of the practice than both the earlier and the later cases justify. Chitty, J., in that case said:

"The rule leaves it to the discretion of the court to pronounce a declaratory judgment when necessary; but it is a power which must be exercised with great care and jealousy."

It is this formula, with some of the precedents under it, that section 6 of the Uniform Act seeks to codify. The formula has traveled to the ends of the world, to Australia, to India, to British Columbia, to Ontario, and to the state of Connecticut;²⁶ like most formulas, affording an opportunity for evading analysis and reasoning, it has enabled courts to refuse a declaratory judgment when they could not justify their action on some better ground. But the cases show that the discretion is far from arbitrary, and has been in practice hardened into rule. The declaration has been declined where it will not serve a practical purpose,²⁷ where the court is without jurisdiction,²⁸ or where the law has provided a more appropriate remedy.²⁹ But where the declaratory action or a regular action is optional, the English courts practically always give the plaintiff his choice. The attitude has changed from one of pronounced conservatism in the rendering of a declaratory judgment to one of enlightened recognition of its value; and if the cases of the last few years are any criterion, obstacles to its issue are now avoided rather than sought. The judicial discretion in making declarations hardly constitutes any greater limitation on the rendering of declaratory judgments than that involved in the exercise of any other of the well-defined fields of equitable jurisdiction.

Section 7 of the Uniform Act provides:

"*Relief, Affirmative or Negative.* When declaratory relief is sought, the declaration may be either affirmative or negative in form and effect."

²⁵ 54 L. T. 903, 905 (1886).

²⁶ *Ackerman v. Union & New Haven Trust Co.*, 91 Conn. 500, 507, 100 Atl. 22 (1917).

²⁷ *Bourgon v. Township of Cumberland*, 22 Ont. L. Rep. 256 (1910); *Lewis v. Green*, [1905] 2 Ch. 340. See 28 YALE L. J., 109, 111 (1918).

²⁸ *British South Africa Co. v. Companhia de Mocambique* (H. L.), [1893] A. C. 602.

²⁹ *N. E. Marine Engineering Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324. See cases discussed in 28 YALE L. J. 114 (1918).

This section was primarily designed to authorize a negative form of the request for a declaration, *e. g.*, that the plaintiff is under "no duty" to repay money to the defendant;³⁰ that the defendant has "no power" to compel the plaintiff to furnish certain information;³¹ that the plaintiffs were under "no liability" to submit to the defendant's exactions.³² These jural relations expressed in negative form have, of course, their affirmative equivalents, *e. g.*, "no duty" = privilege, "no power" = disability, "no liability" = immunity. For that reason, it may be deemed unnecessary to include the section. But some of the continental codes of procedure make special provision for the declaration in negative form, and it has thus found its way into the literature and legal thought on the subject; it may, therefore, be regarded as unobjectionable.

Section 8 of the Uniform Act provides:

"Procedure. Declaratory relief may be obtained by means of the ordinary process and proceedings in equity, or by means of a request or petition in equity, as the nature of the case may require, and where a declaration of rights or other legal relations is the only relief asked, the case may be noticed for early hearing as in the case of a motion."

This section is derived from section 2 of the Michigan Act, except that it omits the provision for proceedings at law contained in that Act. The procedure under the Uniform Act is therefore confined to the equity side of the court, regardless of the nature of the relief sought, legal or equitable. In New York, the declaratory judgment procedure has merely been assimilated to the forms and practice in other actions (rule 210); the prayer for relief, however, must "specify the precise rights and [or ?] other legal relations of which a declaration is requested and whether further relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated."

It is not apparent why the plaintiff should be compelled to state that further relief "could be claimed." If further relief is claimed, *e. g.*, an injunction, he should of course request it, and it is desirable that he should be privileged to request it in conjunction with the declaration; the court should then in its discretion make the dec-

³⁰ Guaranty Trust Co. v. Hannay, *supra*, note 19.

³¹ Dyson v. Attorney-General (C. A.), [1912] 1 Ch. 158.

³² China Mutual Steam Navigation Co., Ltd. v. MacLay, [1918] 1 K. B. 33.

laration even if, for technical reasons, it deems it improper to grant the coercive relief sought, *e. g.*, injunction. By determining the legal relations of the parties, injunction or other coercive relief may indeed become unnecessary, for each party will have had an authoritative judicial decision of his legal position in the premises. The combination of the request for a declaration with a prayer for further relief in one petition has proved valuable in England.

The New York rules have not embodied the provision for "early hearing as in the case of a motion." This would doubtless have increased greatly the popularity of this form of recourse.

Section 9 of the Uniform Act provides:

"*Executory Relief.* Where further relief based upon a declaration of rights or other legal relations shall become necessary or proper after such declaration has been made, application may be made on request or by petition to the Court having jurisdiction to grant such relief for an order directed to any party or parties whose rights or other legal relations have been determined by such declaration, to show cause why such further relief should not be granted forthwith upon such reasonable notice as shall be prescribed by the Court in its order."

This section is likewise derived from the Michigan Act, and is designed to provide for the case of a recalcitrant party who refuses to conform his conduct to the declaration pronounced by the court. If further coercive relief, therefore, becomes necessary, this section is designed to afford it, on an order to show cause. The declaratory judgment, of course, is *res judicata* as to the substantive legal relations involved.

The New York rules fail to provide for any ancillary executory relief after the declaratory judgment has been rendered. Perhaps the necessity for stating such relief as might be but is not claimed, is covered by the requirement of stating such "further or consequential relief" as "could be claimed." Whether this is so or not, it may well be that by seeking and obtaining a declaratory judgment, the plaintiff is barred from requesting further executory relief if only one cause of action is involved. This thought is aroused by the case of *Hahl v. Sugo*,³³ where, under the code of civil procedure, a legal action brought for the recovery of a strip of specific land was held to bar a subsequent action in the nature of a suit in

³³ 169 N. Y. 109, 62 N. E. 135 (1901).

equity to compel the unsuccessful defendant to remove an encroaching wall from the land; the decision was based upon the ground that the plaintiff should have sought all his relief, legal and equitable, in one action, there having been but one wrong, and that the first judgment operated as a bar to the second. Unless the New York practice avoids this same conclusion with respect to a declaratory judgment, thereby barring further executory relief, the new procedure will be considerably limited in its benefit to the community; for it is very important to a declaratory plaintiff to know that he has available a means of enforcing a declaratory judgment in his favor. The obviousness of this conclusion will, it is hoped, persuade the New York courts, by interpretation or special rule, to provide for carrying into effect a declaratory judgment, when necessary, on an order to show cause.

In the bill for declaratory judgments recommended to the California legislature by the California Bar Association, a special section provides:

"Section 1062 a. Cumulative. The remedies provided by this chapter are cumulative and shall not be construed as restricting any other remedy provided by law; and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."

Section 10 of the Uniform Act provides:

"*Trial by Jury.* In any suit or proceeding under this act in which an issue of fact is involved, and a trial by jury of such issue is required by the constitution or the laws of this state, such issue may be submitted to a jury in the form of interrogatories, with such instructions by the Court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case."

This section is derived from section 4 of the Michigan Act, except that it leaves the necessity for the submission of issues of fact to a jury subject to the constitutional requirement in each state. The Michigan, the New York, and the Uniform Acts do not make such submission obligatory, but leave it to the court to determine when the issue of fact, if triable by jury, must be submitted constitutionally. The equitable nature of the relief would tend to diminish the number of submissions to a jury, but the requirements of constitutionality doubtless demand that the courts shall have

power to honor requests for jury trial on issues of fact. The submission in the form of interrogatories will tend to narrow the issues and hasten the findings of the jury.

Section 11 of the Uniform Act provides:

"Costs. Unless the parties shall agree by stipulation, as to the allowance thereof, costs in proceedings authorized by this act, shall be allowed in accordance with the rules of practice, followed in proceedings in equity, wherever applicable, and when not applicable costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party, or apportioned between them."

This section is likewise derived from the Michigan Act (section 5), but embodies a general rule which would have to be adapted to the practice in the individual states. In effect, it leaves the allowance of costs to the established practice in each state or to the discretion of the courts. In New York, Rule 214 provides that costs "shall be discretionary and may be granted to or against any party to the action."

Section 12 of the Uniform Act provides:

"Act Remedial, etc. The enumeration of specific powers of the Courts under this act shall not be held or construed to limit or restrict in any manner the general powers conferred upon the Courts by the first section of this act. This act is declared to be remedial, and is to be liberally construed and liberally administered with the view of making the Courts more serviceable to the people."

This section was designed to avoid the inference deducible by a customary rule of construction that the enumeration of specific powers limited the scope of the general powers conferred on the courts by the first section of the Act. These specific powers are designed merely to furnish a guide to the courts; they constitute merely codifications of the judicial precedents or rules of court established in England, where the declaratory judgment has had a long and increasingly successful career.

The last sentence of the Act is taken almost literally from section 6 of the Michigan Act, and is designed to show the legislative intent that the Act is remedial and is therefore to be liberally construed and administered. Aside from their other grievous errors,

the majority of the Michigan Supreme Court in the Anway case³⁴ failed entirely to notice or give effect to this section. The New York Practice Act provides that the entire Act "shall be liberally construed."

The last section of the Uniform Act, except that relating to the time when the Act is to come into force, provides:

"*Words Construed.* The word person wherever used in this act, shall be construed and held to include and mean any person, partnership, joint stock company, incorporated association, or society, or municipal or other corporation of any character whatsoever."

This section is designed to insure a liberal construction to the word "person" used in sections 2, 4, and 5 of the Act. It is not found in any other Act or draft.

It will be evident that the Uniform Act affords a model or draft statute which is capable of adaptation to the procedure already existing in the various states. Those states conferring on their courts a liberal rule-making authority may confine their statutes to section one or at most to sections one and two and incorporate the remainder of the sections of the Uniform Act in rules of court. States whose courts do not possess such power can adopt the whole Act, with but slight modifications to fit local conditions, as a statute amending their practice acts or codes of procedure or otherwise.

British and continental practice has demonstrated that the courts have not exhausted their usefulness by the employment of their curative functions, but that there remains a large field for the application of their preventive functions which in this country has barely been touched. Under the procedure authorizing declaratory judgments, with its simplicity, its capacity to serve important ends of corrective justice without legal hostilities, its utility in deciding many questions which cannot now be brought to judicial cognizance, and its efficacy in removing uncertainty from legal relations before it has ripened into a bitter litigation, the American public may look forward to a more amicable and simple method of adjusting many conflicts of interest and to an enlarged social service from its courts.

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³⁴ *Supra*, note 13.